No. 97-1503

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

MIDLAND EXPORT, LTD.,

Petitioner,

vs.

ELKEM HOLDING, INC., FERRO INVEST II, INC. and ELKEM METALS COMPANY, L.P.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the District Court correctly applied the teaching of this Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* in determining that Midland lacked standing to bring this antitrust action.

II. Whether there is a conflict among the circuits on an issue raised by this case concerning the doctrine of antitrust standing.

III. Whether the District Court correctly applied the rules governing dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure in dismissing Midland's complaint.

STATEMENT OF INTERESTED PARTIES

The parties are correctly stated in the caption to the petition for a writ of certiorari.

Pursuant to S. Ct. Rule 29.6, Respondents state that Elkem Metals Company L.P. is a partnership in which Ferro Invest I, Inc., Ferro Invest II, Inc., Elkem Management, Inc. and Jebsens Metals Inc. are partners. Ferro Invest II, Inc. is the general partner. All four partners are wholly owned subsidiaries of Elkem Limited, which is a wholly owned subsidiary of Elkem Holding, Inc. Elkem Holding, Inc. is a wholly owned subsidiary of Elkem ASA, a Norwegian public corporation.

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Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of the order of the United States Court of Appeals for the Third Circuit. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 947 F. Supp. 163 (E.D. Pa. 1996), and is reproduced in Petitioner's Appendix ("Pet. App.") at A-18–A-39. The judgment order of the Court of Appeals, affirming the District Court's order without a written opinion, is reported at 1997 U.S. App. LEXIS 33393 (3d Cir. 1997), and is reproduced in Pet. App. at A-40, A-41.

COUNTERSTATEMENT OF THE CASE

Petitioner Midland Export, Ltd. ("Midland") petitions for review of a Third Circuit order affirming the dismissal of its claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The dismissed claims were brought by Midland against Elkem Holding, Inc., Ferro Invest II, Inc., and Elkem Metals Company, L.P. ("Elkem"). The facts are set forth at length in the opinion of the District Court. *See Midland Export, Ltd. v. Elkem Holding, Inc., Ferro Invest II, Inc., and Elkem Metals Co., L.P.*, 947 F. Supp. 163, 164-165 (E.D. Pa. 1996) (Pet. App. A-20–A-24). The courts below held that Midland lacked standing to bring its antitrust claims.

The business of Midland, an importer of silicon metal from China, allegedly suffered when the International Trade Commission ("ITC") imposed antidumping duties on the imports. The duties were imposed after the International Trade Administration of the Department of Commerce ("Department of Commerce") found that the silicon metal was being sold in the United States at "unfair prices," and the ITC found that sales of the imports at unfair prices caused injury to the domestic industry (the "Antidumping Proceeding").

Midland's complaint alleges that the antidumping duties were imposed by the ITC as a result of a conspiracy among the defendants to fix the domestic price of silicon metal. Midland alleges that the domestic producers fixed prices at a high level in order to drive their customers into the arms of importers, thus making it appear that the lower-priced importers were causing injury to the domestic producers. The courts below held that any injury to Midland was the direct result of the antidumping duties, not the alleged price fixing conspiracy, so that it lacked standing to raise an antitrust claim.

Midland instituted this action against Elkem under the Clayton Act of 1914, 15 U.S.C. § 12, *et seq.* (1990 & Supp. 1996), seeking damages for alleged violations of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1, *et seq.* (1990 & Supp. 1996). As defendants Midland names three related Elkem entities (a production company, one of its parents and a related holding company) and alleges that they conspired with one another to fix prices. It also alleges that unnamed sellers, not made parties in its complaint, were parties to the conspiracy.

Midland's business consists of importing and exporting ferroalloys, including silicon metal and ferrosilicon, which it sells to purchasers in the United States. Included among the products it sells in the domestic market is silicon metal imported from China. Elkem Metals competes with Midland in the sale of silicon metal in the United States.[1]

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1. In its Petition for Writ of Certiorari ("Pet."), Midland asserts that "the Defendants — Appellees account for essentially all sales in the relevant market." Pet. at 3. This untrue allegation is contradicted by other allegations to the effect that Elkem conspired with other silicon metal sellers, who would not exist if Elkem were the sole seller. *See* Midland's Complaint at ¶9, Pet. App. at A-9, A-10.

The Antidumping Proceeding, entitled Silicon Metal from the People's Republic of China, INV. NO. 731-TA-472, was initiated on August 24, 1990 by a number of domestic silicon metal producers, one of them being Elkem, based on the selling of silicon metal imported from China at less than fair value in the United States which thereby caused a "material injury" to the domestic silicon metal industry. The Department of Commerce, after comparing the prices charged by Chinese producers of silicon metal in their home market with the prices charged in the United States, found that imports from China were being sold in the United States at "less than fair value." At the next level of the Proceeding, the ITC determined that the silicon metal industry in the United States had been materially injured by reasons of imports from China. The ITC imposed duties and tariffs on silicon metal imported from China to increase its price in excess of 100 percent. The imposition of these duties allegedly caused Midland to suffer monetary loss, lost future profits, and allegedly impaired its business relationships with third-party purchasers and consumers.

Midland alleges that Elkem deliberately engaged in price fixing with the intent of increasing the domestic price, thus driving its customers to purchase lower-priced imports, and making it appear to the ITC that the domestic industry was being injured by the import prices. Elkem's scheme, as alleged by Midland, depended on the exercise of Department of Commerce and ITC discretion in Elkem's favor. Midland alleges that these agencies were misled into issuing antidumping duties by the price fixing in which Elkem participated. Pet. at 4-5.

Recognizing the indirectness of Midland's alleged injury while accepting as true all of Midland's allegations, the District Court dismissed Midland's complaint in its entirety, finding that Midland lacks standing to assert its federal antitrust claims

against Elkem. While suggesting the absurdity of Midland's conspiracy theory, the District Court accepted as true all of the allegations in Midland's complaint for purposes of deciding the motion and dismissed the complaint in its entirety for lack of standing.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE ORDER OF THE DISTRICT COURT WHEREBY IT PROPERLY APPLIED THE TEACHING OF THIS COURT'S DECISION IN *ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS.*

The District Court applied the standards for antitrust standing explicated by this Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). Midland does not challenge those standards.

In *Associated General Contractors*, this Court stated that although

> [h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, . . . the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

Id. at 535, n.31. The Court clarified the application of Section 4 of the Clayton Act, 15 U.S.C. § 15, by stating that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust

violation." *Id.* at 534. In declining to read the statute broadly, this Court articulated limitations on the awarding of damages, based on the statute's purpose of deterring antitrust violators and providing adequate compensation for directly injured victims. The Court set forth the following factors to be considered in determining whether a plaintiff has antitrust standing:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff along with the intent of the defendant to cause the harm, "with neither factor alone conferring standard";
>
> (2) whether the alleged injury is the type for which the antitrust laws were intended to compensate;
>
> (3) the directness of the alleged injury, "which addresses the concerns that liberal application of standing principles might produce speculative claims";
>
> (4) the existence of more direct victims of the alleged antitrust violations; and
>
> (5) the potential for duplicative recovery or complex apportionment of damages.

Id. at 537-545. This Court has not altered or appended these factors since its decision in *Associated General Contractors.* Midland does not ask it to do so.

Following this Court's directive that Midland's claims must be analyzed on a case-by-case basis in light of the above factors, *Associated General Contractors*, 459 U.S. at 536-538, the District Court properly analyzed Midland's pleaded allegations.

Pet. App. at A-28, A-29. First, the District Court concluded that

> the causation and directness factors . . . cut heavily against Midland given the attenuated causal connection between the anticompetitive practices alleged and the harm that ultimately befell Midland.

Pet. App. at A-29, A-30 (citations omitted). The District Court made a legal determination, for purposes of this motion, that the direct cause of Midland's loss of sales was the antidumping duties imposed on Midland by the ITC. Recognizing that the antidumping duties imposed on Midland by the federal agencies stemmed from the price Midland was charging for its product in the domestic market, the court held that the alleged conspiracy was not a direct cause of Midland's harm. Pet. App. at A-30.

The District Court then applied the remaining *Associated General Contractors* standards, all of which it found to support dismissal. Pet. App. at A-31–A-36. It determined that the imposition of antidumping duties was not the type of loss that price fixing is likely to cause, that more direct victims of the alleged antitrust violations existed who might bring claims, and that a potential existed for duplicative recovery and complex apportionment of damages. *Id.* With each *Associated General Contractors* factor weighing in favor of a finding of no antitrust standing, the District Court dismissed Midland's claims. Pet. App. at A-37.

In its Petition, Midland incorrectly asserts that the District Court "relie[d]" on the "direct purchaser rule" set forth in *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977). Pet. at 18-19. Midland misstates the District Court's opinion and fails to recognize the role of the direct purchaser doctrine in the antitrust standing context. In *Illinois Brick*, this Court held that an indirect

purchaser of concrete blocks who had paid a higher price because its suppliers were victimized by a price fixing conspiracy could not recover treble damages. 431 U.S. at 745-746. As expressed by the Court, this holding was based on the difficulty of tracing the impact of price fixing beyond the directly affected first level of purchasers and the danger of multiple liability in treble damages actions. *Id.* at 737-738. In *Associated General Contractors*, the Court stated that the concerns underlying the creation of the indirect purchaser rule should serve as a guideline for courts in antitrust standing cases. 459 U.S. at 544-545. As stated by the Court, "[t]he same concerns [as expressed in *Illinois Brick*] should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act. As the Court wrote in *Illinois Brick*, massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits." *Id.* These concerns, therefore, which stem from the rationale applied in *Illinois Brick*, resulted in the fifth *Associated General Contractors* standard to be applied in antitrust standing cases, *i.e.*, consideration of the potential for duplicative recovery or complex apportionment of damages. *Id.*[2]

The District Court here utilized the rationale enunciated in *Illinois Brick* in applying the fifth *Associated General Contractors* factor to the allegations contained in Midland's complaint. Contrary to Midland's assertion that the District Court "relie[d]" on the indirect purchaser rule, the District Court simply found support for its decision by utilizing the rationale underlying the rule, which is precisely what this Court did in *Associated General Contractors*. Pet. App. at A-33. In discussing the potential for duplicative recovery and complex apportionment of damages, the District Court stated:

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2. The Court more recently reiterated that the rationale of the indirect purchaser rule is to eliminate complex apportionment of damages and multiple recoveries in *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 208, 212 (1990).

> [t]he policy behind the indirect purchaser rule informs our judgment in this case because here, too, an apportionment morass would result from permitting recovery on an indirect theory of causation. Midland alleges that Defendants were among nine petitioners who initiated the Anti-Dumping Proceeding that resulted in the imposition of the duties at issue here. Defendants can be said to have "caused" the ITC's determination only to the extent that their alleged price fixing and the information they supplied actually influenced the ITC's decision. The statute, 19 U.S.C. § 1671 *et seq.*, and federal regulations, 19 C.F.R. § 201 *et seq.*, that define the standards and procedures employed in the Anti-Dumping Proceeding make clear, however, that the ITC considers numerous factors in deciding whether or not to impose an anti-dumping duty in a given situation and in what amount. Some of these factors, such as the "estimate of foreign market value" of the goods in question . . . have nothing to do with the alleged price fixing conspiracy or any market distortion that would result. Thus, determining the degree to which the ITC actually relied on information unrelated to the alleged conspiracy would inevitably be a highly speculative inquiry, impossible to resolve with any degree of certainty. . . . Thus, the fifth and final *Associated General Contractors* factor — the potential for duplicative recovery or complex apportionment of damages — also militates strongly in favor of dismissal.

Pet. App. at A-34–A-36 (citations omitted). Having fully adhered to the precepts enunciated in *Associated General Contractors*, the District Court's consideration of the rationale

underlying the indirect purchaser rule to simply support its determination was justified and proper.[3]

As can best be deciphered from its Petition, Midland implies that the application of the analysis applied by the United States Court of Appeals for the Seventh Circuit in *Sanner v. Board of Trade of City of Chicago*, 62 F.3d 918 (7th Cir. 1995), would result in a finding of antitrust standing in this case. The facts in *Sanner* are distinguishable from those at issue in the case at hand. Further, since the analysis employed in *Sanner* simply follows the *Associated General Contractors* factors, Midland's contention is meritless.

In *Sanner*, the Chicago Board of Trade (the "Board") issued a resolution requiring all holders of gross long positions in soybean futures contracts to liquidate their positions by a certain percentage by a certain date. *Sanner*, 62 F.3d at 920-921. A group of cash market sellers of soybeans initiated a claim against the Board alleging that the resolution led to a price decline in the soybean futures market, which resulted in a proportionate decline in the cash markets for soybeans. *Id.* at 922. They claimed that the resolution resulted from a conspiracy to cause a fall in soybean cash crop prices and to maintain those prices at the low levels. *Id.* at 921.

The District Court, in finding that the soybean farmers had no antitrust standing, based its decision on the separateness of the cash and future markets. *Id.* at 926. Finding that the cash

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3. Midland erroneously asserts that *Associated General Contractors* holds that the directness of injury factor "encompasses all of the damages naturally flowing from alleged anti-competitive acts." Pet. at 10. To the contrary, the Court said, "Congress did *not* intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General Contractors*, 459 U.S. at 534 (emphasis added).

market was distinct from the futures market, the court determined that because the resolution was directed towards the futures market, the sellers in the cash market did not allege an injury sufficiently direct to confer antitrust standing. *Id.* In reversing, the Court of Appeals eliminated the separateness of the cash and futures markets. *Id.* at 928-929. With the elimination of the distinctness between the markets, the court, in applying the *Associated General Contractors* factors, determined that a direct injury was alleged because the "farmers are not attempting to stand in the shoes of a third party or to complain of the secondary consequences arising from an injury to a third party." *Id.* at 929.

Application of the analysis employed in *Sanner* would not lead to a different result in the case at hand. In *Sanner*, the soybean farmers brought an action directly against the entity which took the allegedly injurious action, *i.e.*, the Board. The court, applying the third *Associated General Contractors* factor, noted that the "the farmers' injury allegedly occurred as an intentional result of the adoption and promulgation of [the Board's] Resolution." *Id.* at 929. It held, therefore, that the directness of injury factor was satisfied because it was the Board's direct action which caused the alleged injury. In the case at hand, any injury suffered by Midland directly resulted from the ruling of and the antidumping duties imposed by the ITC. The corollary to *Sanner*, therefore, would be if Midland's action was brought against the federal agencies, not Elkem. It was the action of the federal agencies that directly caused Midland's alleged harm. Any influence that Elkem may have had in bringing about Midland's alleged injury must be characterized as indirect at best. Therefore, Midland's reliance on *Sanner* is misplaced and its allegation that the application of the analysis employed in *Sanner* would compel a different result is clearly erroneous. With both courts having applied the *Associated General Contractors* factors in determining a lack

of standing based on indirectness of injury, *Sanner* actually supports the dismissal of Midland's claims.[4]

In finding lack of standing, the District Court appropriately followed the factors set forth in *Associated General Contractors* and determined that no factor supported the existence of antitrust standing. While it emphasized a lack of direct injury between the alleged conspiracy and Midland's alleged injuries, the District Court thoroughly reviewed each factor in making its decision. Midland's Petition fails to raise any error or impropriety sufficient to warrant this Court's review.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE LAW OF ANTITRUST STANDING.

In its Petition, Midland appears to assert that a conflict in the circuits exists because "other courts" "focus on" or "consider" different concepts when analyzing antitrust standing. Pet. at 20. With no elaboration or discussion, Midland attempts to identify a conflict by asserting that "[s]ome Courts of Appeal have focused on the directness of alleged injury" while "[o]ther Courts of Appeal" utilize concepts of foreseeability, "zone of interest," and "target area." *Id.* Midland further asserts a "confusion" caused by circuits' themselves employing differing approaches. *Id.* It alleges that "the Seventh Circuit's analysis is completely divergent from the Third Circuit's narrow approach to directness."[5] *Id.* at 21. These allegations are inordinately

4. Subsequent to its decision in *Sanner*, the Seventh Circuit has again followed the *Associated General Contractors* directives in finding a lack of antitrust standing. *See Serfecz v. Jewel Food Stores*, 67 F.3d 591 (7th Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).

5. There is confusion because no Seventh Circuit opinion is (Cont'd)

insufficient to establish a conflict among the circuits sufficient to warrant this Court's review. No circuit conflict on antitrust standing exists.

The factors to be employed in analyzing antitrust standing have been decisively set forth and explained by this Court in *Associated General Contractors*. In *Associated General Contractors*, the Court expressly noted the disparity of approaches taken by the circuits and resolved the conflicts over the use of labels: "In our view, courts should analyze each situation in light of the factors set forth in the text *infra*." 459 U.S. at 536, n.33. The cases cited by Midland to support its obscure allegation that a circuit split exists in the law of antitrust standing predate this Court's decision in *Associated General Contractors*.

Regardless of whether a split among the circuits may have existed prior to *Associated General Contractors*, no such split currently exists. The circuits, including the Third, Second, Sixth, and Seventh, all have accepted and applied the factors enunciated in *Associated General Contractors* in analyzing antitrust standing. *See In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1165-1166 (3d Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994); *Serfecz*, 67 F.3d at 595; *Province v. Cleveland Press Publishing Co.*, 787 F.2d 1047, 1050-1051 (6th Cir. 1986); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 295-297 (2nd Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (discussion of abandonment of old approach in light of new approach set forth in *Associated General Contractors*). Because this Court has already clarified the standards and tests to be applied to determine antitrust standing, review is not warranted.

(Cont'd)
cited or discussed in Section C of the Petition. If Midland meant to refer to *Sanner*, that case is discussed *supra*.

III.

THE DISTRICT COURT PROPERLY APPLIED THE STANDARD FOR DISMISSAL UNDER RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Midland's final argument in support of its Petition is that the District Court's consideration of the *Associated General Contractors* factors involved its making factual determinations improper in connection with a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pet. at 23-30. The District Court, however, did not make findings as to disputed facts. In essence, Midland is asking this Court to establish a rule that would make it impossible to apply the *Associated General Contractors* factors to dismiss a case for lack of standing under Rule 12(b)(6). This assertion warrants only a brief response.

In its opinion, the District Court properly articulated and applied the standards governing a Rule 12(b)(6) motion to dismiss:

> In considering this Rule 12(b)(6) motion, we primarily consider the allegations contained in the complaint, although we may also take into account matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint. We must accept as true all of the allegations in the pleadings and must give Midland the benefit of every favorable inference that can be drawn from those allegations. We may properly dismiss the complaint only if it appears certain that Midland cannot prove any set of facts in support of its claim which would entitle it to relief.

Pet. App. at A-24 (citations omitted). Accepting all allegations in Midland's complaint as true, the District Court determined that the allegations were insufficient to establish antitrust standing. In doing so, it made no factual determinations but simply applied law to the facts alleged in Midland's complaint. Thus, the District Court's actions were proper and fully in accordance with Rule 12(b)(6).

The District Court's analysis and procedure mirror that of this Court in *Associated General Contractors*. In that case, the District Court dismissed the plaintiff's complaint. In recognizing that dismissal was proper, this Court acknowledged the court's role in determining antitrust standing based on the allegations contained in the complaint by stating that "the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." 459 U.S. at 535, n.31. As stated by the District Court, in that case,

> [t]he Supreme Court has declined to fashion a black-letter rule for determining standing in every case, holding instead that 'the infinite variety of claims' must be analyzed on a case-by-case basis in light of several factors.

Pet. App. at A-28. Based solely on the allegations set forth in the complaint, the Court found the following:

> It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered by "certain" construction contractors and subcontractors. . . . If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and . . . they would have a right to maintain their own treble-damages actions against

> the defendants. . . . The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general.

Associated General Contractors, 459 U.S. at 541-542. Further,

> We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws . . . are insufficient as a matter of law. Other relevant factors — the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy — *weigh heavily* against judicial enforcement of the Union's antitrust claim. Accordingly, we hold that, based on the allegations of this complaint, the District Court was correct in concluding that the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

Id. at 545-546 (emphasis added).

The District Court, therefore, did nothing different than follow the precepts enunciated by this Court in *Associated General Contractors*. Just as the Supreme Court determined that the factors "weigh[ed] heavily" against the finding of standing, the District Court properly concluded that the same factors, which must be "weighed and balanced," "cut heavily"

against the finding of antitrust standing. Pet. App. at A-29. In making this determination, the District Court accepted as true the allegations contained in Midland's complaint and made no additional factual determinations.[6] Midland cannot escape the confines of its poorly pleaded complaint by alleging that the District Court improperly made further factual findings. The insufficiency of the complaint's allegations to confer antitrust standing cannot be cured by passing blame to the District Court or asserting, without discussion, the court's rejection of a "novel legal theory." Pet. at 27. Discovery of additional facts in this matter bears no relevance to the legal insufficiencies of Midland's complaint. It is not up to any court to go beyond the language of the pleadings themselves and the causes of action contained therein to attempt to independently discover a means to cure the legal insufficiencies of a complaint. Therefore, the Petition should be denied.

IV.

THE QUESTIONS PRESENTED BY MIDLAND ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT REVIEW BY THIS COURT.

At most, Midland complains that the District Court did not apply this Court's standards properly to the facts of Midland's

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6. While we agree with Defendants that the economic premise of Midland's theory — that inflated domestic prices would make the ITC more likely to conclude that the imported products were causing material injury to the domestic market — is not unassailable, we are required here to give Midland the benefit of every favorable inference that can be drawn from its allegations. We therefore accept this premise as valid for purposes of deciding this motion.

Pet. App. at A-32, A-33, n.4.

particular case. It is Elkem's position that the District Court's decision was exactly right, but in any event, the fact-laden inquiry that Midland is requesting here simply does not present a question that is sufficiently important to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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